Supreme Court, U.S.
FILED
JUN 12 2001
OFFICE OF THE CLERK

No. 00-1488

IN THE
# Supreme Court of the United States

ARKANSAS DEPARTMENT OF EDUCATION,
*Petitioner,*

v.

JIM C, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF J.C., ET AL.,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

---

## REPLY BRIEF FOR PETITIONER

---

MICHAEL A. CARVIN
*Counsel of Record*
JONES, DAY, REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

MARK PRYOR
Attorney General
BILL PUTMAN
Chief Deputy Attorney General
DENNIS R. HANSEN
Deputy Attorney General
323 Center Street, Suite 1100
Little Rock, AR 72201
(501) 682-2007

*Counsel for Petitioner*

# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

REPLY BRIEF FOR PETITIONER ..... 1

CONCLUSION ..... 5

## REPLY BRIEF FOR PETITIONERS

The Eighth Circuit in this case held that the Spending Clause permits Congress to compel state agencies, as a condition for receiving any federal funding for any purpose, to waive Eleventh Amendment defenses to suits under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Respondents do not dispute the obvious importance of that holding. Instead, respondents argue that further review is unwarranted because this case might soon become moot and because the Eighth Circuit' six-to-four decision was correct on the merits. Neither contention has merit.

1. This case presently is not moot. As respondents explain, the district court granted summary judgment for petitioner and, on April 27, 2001, denied the private respondents' motion for reconsideration. However, the private respondents, despite asserting that they "do not *intend* to file an appeal" from that decision (Opp'n at 4 (emphasis added)), have made no firm commitment to abandon their appeal rights. And the federal respondents contend (Gov't Resp. at 7 & n.2) that the time for filing an appeal is governed by the sixty-day period set forth in Fed. R. App. P. 4(a)(1)(B), which would make the notice of appeal due on June 29, 2001. Until that time, respondents remain free to appeal the summary judgment rejecting their Section 504 claims, and petitioner wishes to resist any such appeal on Eleventh Amendment grounds.

The possibility that the case will become moot on June 29 does not counsel against granting the petition for certiorari. If the private respondents *do* file a notice of appeal by June 29, the mootness alleged by respondents simply will not occur. On the other hand, if the private respondents do *not* file a notice of appeal by June 29, the case will then become moot. Because any mootness would occur on June 29, there is no possibility of wasted effort in needlessly briefing the Spending Clause issue on the merits. And because the mootness inquiry will turn simply on whether the private respondents choose to file a notice of appeal, there is no possibility of collateral

litigation on that question.[1]

2. On the merits, respondents' analysis confirms both the breadth and indefensibility of the court of appeals' decision. As explained in the petition for certiorari, *South Dakota v. Dole*, 483 U.S. 203 (1987), imposes distinct germaneness and non-coercion requirements on Congress's Spending Clause power to attach conditions to federal expenditures. Nonetheless, the United States contends (Gov't Resp. at 15-16) that the germaneness requirement is satisfied despite conceding that the funding conditions at issue apply to "*all* of the operations of the state agency that receives *any* federal funds" (emphases added). The United States also contends (*id.* at 17-18) that, despite the breadth of these conditions, a state agency may simply "say 'no' to the offer of federal funds" and, further, that the amount of funds subject to these conditions is irrelevant because, "[i]f the federal government is justified in imposing conditions on modest expenditures of federal resources, it should be no less justified in imposing those conditions when the amount of federal money

---

[1] If this case were to become moot before its final disposition in this Court, vacatur of the Eighth Circuit's decision would be appropriate. "'The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot . . . pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.'" *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994), quoting *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). The federal respondents err in contending (Gov't Resp. at 7 n.3) that *Munsingwear* is inapplicable because the mootness here would be "in large part attributable to petitioner." In *Bonner Mall*, this Court held that vacatur was inappropriate where the party seeking vacatur, by having settled the case, engaged in a "voluntary forfeiture of review." 513 U.S. at 26. Here, by contrast, the mooting event would be a "voluntary forfeiture of review" *by respondents*. In that circumstance, *Munsingwear* is clearly applicable. *See Arizonans For Official English v. Arizona*, 520 U.S. 43, 72 (1997) (vacatur appropriate where mootness caused by "unilateral action of the party who prevailed in the lower court").

increases." That analysis has no limiting principles. If it is correct, then *Dole*'s germaneness and non-coercion requirements are a dead letter, and the Spending Clause will have "render[ed] academic the Constitution's other grants and limits of federal authority." *New York v. United States*, 505 U.S. 144, 167 (1992).

In truth, it is not surprising that respondents would resort to such broad rationales to defend the court of appeals' opinion on the merits. On its face, the statute at issue purports to compel *every* state agency that receives *any* amount of federal funds for *any* purpose to waive Eleventh Amendment defenses to claims under *any* federal statute prohibiting discrimination by recipients of federal funds (including Section 504). 42 U.S.C. § 2000d-7(a). But *no* state agency refuses *all* federal funds. Accordingly, under the construction of the Spending Clause adopted below, Congress could overcome *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), among other decisions, through the use of non-germane and coercive spending conditions. This Court should not, without even considering the question, permit the Spending Clause to become such a fertile source of "waiver" that can only be described as abrogation-by-other-means.

3. Respondents offer a few perfunctory and meritless contentions why the Spending Clause issue is not cleanly presented.

The federal respondents so contend (Gov't Resp. at 12) because petitioner accepts federal financial assistance under the Individuals With Disabilities Education Act ("IDEA"). Such acceptance might trigger a waiver of Eleventh Amendment defenses to claims *under the IDEA* by operation of 20 U.S.C. § 1403 (Pet. App. 29a), but that analysis does not affect the separate question of the putative waiver of Eleventh Amendment defenses to claims *under Section 504* by operation of 42 U.S.C. § 2000f-7(a).

The private respondents complain (Opp'n at 4) about "[t]he absence of any factual record concerning federal financial assistance received by" petitioner. However, in rejecting petitioner's Eleventh Amendment defense in the context of resolving a motion to dismiss (Pet. App. 2a), the Eighth Circuit necessarily held that 42 U.S.C. § 2000f-7(a) effected a valid waiver regardless of the facts. If that conclusion rests on a misconstruction of the Spending Clause, this Court should say so and, if necessary, remand for factual development in light of correct standards of germaneness and non-coercion.

Finally, the private respondents also contend (Opp'n at 11) that the petition for certiorari "seeks to present to this Court a very different case from that decided below." Even a cursory review of the decision below rebuts that contention. *E.g.* Pet. App. 6a ("The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504. We think the Spending Clause allows Congress to present States with this sort of choice."). It is precisely that question -- the importance of which respondents nowhere dispute -- on which petitioner seeks further review in this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. CARVIN
*Counsel of Record*
JONES, DAY, REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939

MARK PRYOR
Attorney General
BILL PUTMAN
Chief Deputy Attorney General
DENNIS R. HANSEN
Deputy Attorney General
323 Center Street, Suite 1100
Little Rock, AR 72201
(501) 682-2007

*Counsel for Petitioner*